No. 6007

1662

United States

Circuit Court of Appeals

For the Ninth Circuit.

MONTGOMERY WARD & COMPANY, a Corporation,

Appellant,

vs.

R. A. HAMMER, a Minor, by His Guardian *ad litem,* I, R. HAMMER,

Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for the District of Oregon.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

Index.

NAMES AND ADDRESSES OF ATTORNEYS OF RECORD.

WILBUR, BECKETT, HOWELL & OPPENHEIMER, Board of Trade Building, Portland, Oregon,

For the Appellant.

COLLIER, COLLIER & BERNARD, Spalding Building, Portland, Oregon,

For the Appellee.

In the District Court of the United States for the District of Oregon.

March Term, 1929.

BE IT REMEMBERED, That on the 11th day of June, 1929, there was duly filed in the District Court of the United States for the District of Oregon a transcript of record removed from the Circuit Court of the State of Oregon, the complaint included therein, being in words and figures as follows, to wit: [3*]

*Page-number appearing at the foot of page of original certified Transcript of Record.

In the Circuit Court of the State of Oregon for the County of Multnomah.

No. N.–3439.

R. A. HAMMER, a Minor, by His Guardian Ad Litem, I. R. HAMMER,

Plaintiff,

vs.

MONTGOMERY WARD & CO., a Corporation,

Defendant.

COMPLAINT.

Comes now the plaintiff, and for cause of action against the above-named defendant, alleges:

I.

That I. R. Hammer was heretofore and on the 22d day of April, 1929, duly and regularly appointed guardian *ad litem* of the above-named plaintiff, R. A. Hammer, a minor, pursuant to the order of the Honorable Robert G. Morrow, one of the Judges of the above-named court, for the purpose of bringing this action.

II.

That at all times herein mentioned, the defendant was and now is a corporation duly organized and existing under and by virtue of the laws of the State of Oregon, with its principal office and place of business within the city of Portland, Multnomah County, Oregon. [4]

III.

That at all times herein mentioned, the plaintiff was employed by the defendant as a laborer in and about its business, and that during all the times herein mentioned, the plaintiff was engaged in said employment for and on behalf of the defendant, in the main building and place of business of said defendant in Portland, Oregon.

IV.

That during all the times herein mentioned, the defendant was engaged in selling and offering for sale, shipping and storing goods, wares and merchandise of various kinds and descriptions, and handling, removing and storing said goods, wares and merchandise in its buildings, storerooms and storehouse, where the plaintiff was so employed.

V.

That while the defendant was so engaged in its said business, and while the plaintiff was in the performance of his duty, as an employee of said defendant, the defendant stored and kept a portion of its merchandise in the 5th story of one of its said buildings in what is commonly termed and designated as pit-racks, which said pit-racks consisted of a wooden frame structure resting upon the cement floor in said building, which said pit-racks were about three feet wide, three feet deep and eight feet high, the exact size of said pits however is not known to this plaintiff; that said pit-racks ran easterly and westerly across said building and adjoined each other, and were constructed as follows,

to wit: by partitions running easterly and westerly across said floor of said building about eight feet high; on the northerly and southerly side [5] of said partition there were other partitions running at right angles, or in a northerly and southerly direction, and were about three feet more or less apart, and eight feet high; that said pits were enclosed on the back and the easterly and westerly side with frame-work; the front end of said pits were open and facing upon a hallway or aisle running easterly and westerly across said building, which said hallway or aisle was about three feet wide and was faced on either side by said pit-racks; that said pit-racks were covered by four boards of about 1 x 6 inches, and about three feet long; that said four boards were held together by two other boards of like dimensions that were nailed at right angles across said four boards and rested upon a one-inch joist running along the inner side of said pit-racks on the easterly and westerly side thereof and near the top of said pit-racks; that said covering or top when so made formed a board lattice or scaffolding, and was loosely placed upon the top of said pit-racks to rest on said joists without being fastened or in any manner secured, so as to hold them in place, nor were the easterly or westerly walls of said pit-racks braced so as to keep them from spreading or bulging apart.

VI.

That at all times herein mentioned, the defendant had a portion of its goods, wares and merchandise

in bulk piled up on top of said pit-racks, which said goods was resting upon said loose and unsecured board lattice tops or coverings.

VII.

That on or about the 2d day of March, 1929, the defendant was engaged in removing a portion of its stored [6] goods, which was piled up on the top of said pit-racks as aforesaid, from one place upon said floor to another place thereon, and that this plaintiff, in carrying out his duties, was assisting in such removal of said goods, and while in the performance of his duties, he was ordered by one of the foremen of the defendant, under whom said plaintiff was working, and to whose orders the plaintiff was bound to conform and did conform, to go up on the top of said pit-racks and to remove the defendant's goods therefrom and to pass them down to other employees of the defendant, which other employees loaded said goods upon a hand truck which operated along said aisles aforesaid, and while in the performance of his duties, and in complying with the orders of said foreman, the plaintiff was injured as hereinafter set forth.

VIII.

That the work in which the plaintiff was so engaged involved risk and danger to the employees of the defendant, and particularly to this plaintiff, in that the plaintiff was required as aforesaid to go up on the top of said pit-rack, which is about eight feet above the cement floor and to work upon said coverings or tops that were loosely placed

thereon, and which were in no manner secured or fastened to hold them in place, or keep them from slipping or sliding, or otherwise becoming loose and fall, or becoming insecure, as a place upon which this plaintiff was compelled to work, walk and move about in removing said goods from the top thereof as aforesaid, and that while the plaintiff was so engaged he stepped upon one of said coverings on said pit-rack, which gave away at one end, thereby giving away and falling, and caused the plaintiff to fall from the top of said pit-rack down to said cement floor. [7]

IX.

That it was the duty of the defendant to use every device, care and precaution, which was practical for it to use for the protection and safety of the life and limb of its employees, and particularly this plaintiff, limited only by the necessity of preserving the efficiency of the structure upon which the plaintiff was working, and without regard to additional cost of suitable material or safety appliances or devices.

X.

That said defendant was careless and negligent in that it did not exercise reasonable care in furnishing to this plaintiff, who was so employed, a reasonably safe place to work, and failed and neglected to use any precaution, care or device for the purpose of holding said loose flooring, upon which the plaintiff was working, in place, and carelessly and negligently ordered and permitted the plaintiff to work upon said loose flooring without in any

manner making the same safe or secure, and that one of the covers upon said pit-racks the end of the board had been removed or slipped off of one of said one-inch joists, either caused by one of the partitions of said pit-racks being bulged or spread, or by reason of said loose covering being removed or jostled about, so that the end of the boards were not secure upon said joists, and that when the plaintiff, in the performance of his duty, stepped upon said covering, the same gave away as aforesaid, causing the plaintiff to fall down to said cement floor about eight feet below.

XI.

That the defendant, by the use of ordinary or any care, could have made said false flooring or lattice board work, upon which plaintiff was working, safe and [8] secure by fastening the same with hooks, nails or screws to the sides of said pit-rack, or to said joist, upon which said top rested, or by bracing the easterly and westerly walls of said pit-racks so that they would not bulge or spread apart, by placing a brace across the same, or by placing a wider joist at the top and along the inner sides of said pit-racks, upon which said boards rested; that either or any or all of said methods, devices or precautions would have in no manner lessened the efficiency or use of the structure for which it was used, nor in any manner interfered with the operation of the defendant in carrying out its said business, but that the defendant carelessly and negligently and wantonly failed, refused and neglected to use any of said methods or any other method or

device to hold said loose floorings in place, so as to prevent them from falling, and particularly the one upon which this plaintiff was engaged in his employment at the time he fell as aforesaid, and while he was carrying out and was under the orders of the defendant's foreman, under whose orders he was bound to conform and did conform, and having conformed to said orders, fell.

XII.

That by reason of the careless and negligent acts on the part of the defendant as aforesaid, the plaintiff fell upon said cement floor, striking his lower back, and hips, and was thereby greatly, painfully and permanently injured, in that the muscles, ligaments and tendons of his lower back and hips were bruised and sprained; that his back was injured, sprained and bruised in the lumbo-sacral region and the right sacro-iliac joint was sprained, slipped and injured; that the plaintiff, by reason thereof, [9] suffered and for a long time to come will continue to suffer great mental and physical pain and anguish; that plaintiff was thereby rendered sick and unable to work, and has not yet been able to perform work or labor, and that by reason thereof he will not for a long time to come, if ever, be able to fully perform work and labor; that by reason thereof, the plaintiff cannot lie down in any position, so as to rest or relief him from pain, and aches and distress in the region of his sacro-iliac joints, his back and hips, nor can he walk, stand erect, stoop over or bend from side to side without

great and continuing pain; that plaintiff's constitution has been, and for a long time to come, will be greatly impaired and his vitality and strength lost and diminished, and his health undermined, weakened and impaired; that by reason of said injuries the plaintiff received a great nervous shock; that plaintiff's nerves in his back, spine and hips are injured, weakened and impaired, and that by reason thereof, plaintiff is unable to rest or to sleep for only short periods of time, often not being able to sleep all night, and that this condition, by reason of the injuries so received, for a long time to come will continue so to remain; that plaintiff suffers from dizzy spells when getting up, from headaches, pains in his back and hips, while either lying down or standing up, and that by reason of said injuries the plaintiff has been compelled to spend money for physicians and medical care, and will for a long time to come be compelled to expend money for his care, and will be unable to earn money from his labor, and said plaintiff, by reason of the matters and things herein set forth, was thereby damaged in the sum of Thirty Thousand Dollars ($30,000.00).

WHEREFORE, plaintiff demands judgment against [10] the defendant for the sum of THIRTY THOUSAND DOLLARS ($30,000.00), together with his costs and disbursements herein incurred.

COLLIER, COLLIER & BERNARD,
Attorneys for Plaintiff.

State of Oregon,
County of Multnomah,—ss.

I, I. R. Hammer, being first duly sworn, depose and say that I am guardian *ad litem* of R. A. Hammer, a minor in the above-entitled cause; and that the foregoing complaint is true as I verily believe.

I. R. HAMMER.

Subscribed and sworn to before me this 25th day of April, 1929.

[Notarial Seal] GEO. R. DUNCAN,
Notary Public for the State of Oregon.

My commission expires June 13, 1930.

[Endorsed]: Filed April 30, 1929.
Transcript of record. Filed June 11, 1929. [11]

AND AFTERWARDS, to wit, on the 19th day of June, 1929, there was duly filed in said court an answer, in words and figures as follows, to wit: [12]

ANSWER.

Now comes the defendant in the above-entitled action and answering the complaint of the plaintiff herein admits, denies and alleges as follows:

I.

Admits the allegations in Paragraph I of said complaint.

II.

Denies the allegations in Paragraph II of said complaint.

III.

Admits the allegations in Paragraph III of said complaint.

IV.

Admits the allegations in Paragraph IV of said complaint.

V.

Answering Paragraph V of said complaint herein this defendant admits that it kept stored a portion of its merchandise on the fifth floor of said building, storing the said merchandise in what is known as pit-racks, consisting of a wooden frame or structure resting upon the floor and that said pit-racks ran easterly and westerly across the said room where they were located and adjoining each other and that the front end of said pits [13] were open facing upon an aisle running in front of said pit-racks and that said pit-racks were made of boards and that the said pit-racks have a covering over the top thereof so that said racks when finished may be used for placing merchandise therein and upon the top thereof but this defendant denies all of the other allegations in said Paragraph V of the complaint.

VI.

This defendant denies the allegations in Paragraph VI of said complaint.

VII.

This defendant denies the allegations in Paragraph VII of said complaint.

VIII.

This defendant denies the allegations in Paragraph VIII of said complaint.

IX.

This defendant denies the allegations in Paragraph IX of said complaint.

X.

This defendant denies the allegations in Paragraph X of said complaint.

XI.

This defendant denies the allegations in Paragraph XI of said complaint.

XII.

This defendant denies the allegations in Paragraph XII and this defendant denies all of the allegations in said complaint except as hereinabove specifically admitted. [14]

Further answering said complaint this defendant alleges:

I.

That it is a corporation organized and existing under the laws of the State of Delaware and is a citizen and resident of the State of Delaware and was at the time of the commencement of this action and at the time of the happening of the accident

mentioned in the complaint and that the amount in controversy exceeds the sum of $3,000.00 exclusive of interest and costs.

II.

That during March, 1929, the said plaintiff herein was employed in the warehouse of the said defendant working on the fifth floor and at that time the defendants were using said room as a storehouse or the place for storing its goods, wares and merchandise; that in said storeroom there were aisles several feet wide running east and west across said room and on each side of said aisle were racks or bins for the purpose of storing merchandise, which bins were erected by using upright pieces at each corner thereof and boards across the front and back and ends with a covering on top thereof, said bins or sections being four or five feet long and three or four feet deep and about six feet high with an opening in the front thereof so that goods may be put into each bin or taken out and a covering across the top of said bin so that in case of necessity merchandise might be stored on the top of said bin.

III.

That at the time of the accident mentioned in the complaint the said plaintiff with other employees was engaged in erecting said bins and after the same had been erected, engaged in placing merchandise within the said bins or up on the top thereof [15] and at the time of the accident as alleged to have happened in the complaint, the plaintiff and other employees of the defendant had started to

erect an additional bin alongside the other bins and that while the said bin upon which the plaintiff was working at the time of the accident was in process of construction and before it had been completed or braced and while other employees of this defendant were getting material for the purpose of completing said bin and bracing the same and before the said bin was a completed structure or ready for any goods to be placed therein or upon the same or before the same was fastened and secured, the plaintiff for some reason unknown to the said defendant jumped up on the top of the said bin, falling thereupon, causing the said sides of the rack to spread and allow the said plaintiff to fall to the floor, which is the accident mentioned in the complaint.

IV.

That the said plaintiff was a man experienced in the line of work that he was engaged in at the time of said accident and in the manufacturing and making of pit-racks as is alleged herein and understood all of the risks, hazards and dangers of his employment and the risks, hazards and dangers of jumping or climbing up on an incomplete structure and before the same was made ready for use or the bearing of any weight and assumed all of the risks and hazards and dangers of his employment and the risks and hazards and dangers of getting up on an incomplete structure, as is hereinabove alleged.

V.

That the said plaintiff also was guilty of negli-

gence causing and contributing to his injury in that while said structure, as is alleged hereinabove, was in process of erection and before the same was completed or ready for the bearing of any weight and [16] while the plaintiff and his fellow employees were in the process of erecting the same and getting material for the purpose of completing the bracing and building of said rack the plaintiff jumped up on the top thereof causing the same to spread and allowing the plaintiff to drop to the floor, all of which negligence on the part of the plaintiff caused and contributed to his injury.

VI.

That the said accident that happened herein was, so far as this defendant is concerned, an unavoidable accident and one that could not have been prevented by the exercise of any due, reasonable or proper care on the part of this defendant.

WHEREFORE this defendant prays that the plaintiff take nothing by his complaint herein and that this defendant be given a judgment for costs and disbursements.

WILBUR, BECKETT, HOWELL & OPPENHEIMER,

Attorneys for Defendant.

Filed June 19, 1929. [17]

AND AFTERWARDS, to wit, on the 25th day of June, 1929, there was duly filed in said court a reply in words and figures as follows, to wit: [18]

REPLY.

Comes now the plaintiff, and for his reply to the defendant's answers filed in the above-entitled action, admits, denies and avers:

I.

Denies each and every allegation, matter and thing in said answer contained, and each and every part thereof, except in so far as said allegations admit or coincide with the allegations of plaintiff's complaint, except this plaintiff admits Paragraph I of the further answer to plaintiff's complaint.

WHEREFORE, having fully replied to defendant's answers, plaintiff demands judgment as asked for in his complaint herein.

COLLIER, COLLIER & BERNARD,
Attorneys for the Plaintiff.

Filed June 25, 1929. [19]

AND AFTERWARDS, to wit, on Wednesday, the 25th day of September, 1929, the same being the 69th judicial day of the regular July term of said court—Present, the Honorable JOHN H. McNARY, United States District Judge, presiding—the following proceedings were had in said cause, to wit: [20]

MINUTES OF COURT—SEPTEMBER 25, 1929 —VERDICT.

Now at this day the parties hereto by their counsel as of yesterday. Whereupon the jurors impanelled herein being present and answering to their names, the further trial of this cause is resumed. And thereafter said jury having heard the evidence adduced, the argument of counsel and the instructions of the Court, retires in charge of proper sworn officers to consider of its verdict. And thereafter said jury returns into court its verdict, in words and figures as follows, to wit:

> "We, the jury empaneled and sworn to try the issues in the above entitled action, find for the plaintiff and against the defendant, and assess the plaintiffs damages in the sum of Twelve Thousand and Five Hundred Dollars,
>
> BENJAMIN B. LUTEN,
>
> Foreman."

which verdict is received by the Court and ordered to be filed. Whereupon

IT IS ADJUDGED that the said plaintiff do have and recover of and from the said defendant said sum of Twelve Thousand and Five Hundred Dollars, together with costs and disbursements taxed at $83.07, and that he do have execution therefor. [21]

AND AFTERWARDS, to wit, on the 25th day of September, 1929, there was duly filed in said court a verdict, in words and figures as follows, to wit: [22]

VERDICT.

We, the jury empaneled and sworn to try the issues in the above-entitled action, find for the plaintiff and against the defendant, and assess the plaintiff's damages in the sum of Twelve Thousand Five Hundred Dollars.

BENJAMIN B. LUTEN,
Foreman.

Filed September 25, 1929. [23]

AND AFTERWARDS, to wit, on the 4th day of December, 1929, there was duly filed in said court a bill of exceptions, in words and figures as follows, to wit: [24]

BILL OF EXCEPTIONS.

BE IT REMEMBERED that heretofore, to wit, on the 23d day of September, 1929, at Portland, Oregon, in the District Court of the United States for the District of Oregon, the above-entitled cause came on for trial to be heard before the Honorable John H. McNary, Judge of the above-entitled court, presiding, the plaintiff appearing by his attorneys, Collier, Collier & Bernard, and the defendant appearing by its attorneys, Wilbur, Beckett, Howell

& Oppenheimer. A jury was duly impanelled to try the said action and the following testimony was taken:

TESTIMONY OF R. A. HAMMER, IN HIS OWN BEHALF.

My name is R. A. Hammer and I live at the present time near Aumsville, Oregon, and have lived there since I was approximately two years old until a year before the accident. During the early part of my life I did chores on the farm and attended a grade school for eight years, high school four years and one year at Willamette University, Salem, and left the University in February, 1928. I have been in excellent health during my entire life, never have been sick nor in any way hurt or had an accident of any kind and have always been healthy, working outside, and never had any sickness. I never lost any time at school and for the last ten years of my schooling have never been absent from school. [25]

After I left Willamette University I did general landscape gardening and general work for my father, carpenter work, and came to Portland about August 20th, 1928, when I went to work for Montgomery Ward about August 20th. During the first two weeks I worked there I packed merchandise and then for ten days I was checking merchandise for perhaps two weeks, and after that I went in the office and did clerical work in getting out late stock orders and general work around the office until the

(Testimony of R. A. Hammer.)

middle of October. Then I went to work for Mr. Adams, Supt. of Operations; and worked there for practically two and a half months or until just after the Christmas holidays perhaps the fourth or fifth of January, and then I went back to the stock order packing-room. They were laying off so much help after Christmas. I worked there for about a month until the last of January until I went back to work for the Service Auditor, Mr. Elrath, and worked for him for about thirty days on outgoing shipments checking over work that I had done when I started. Immediately after this I went to work on the fifth floor, the place where I was injured on March 2d, 1929. My accident happened on Saturday and I went to work there the Monday before. I never had been engaged in construction work. My work had been strictly clerical or of that nature and packing and checking merchandise.

When I went to work on the fifth floor I worked moving merchandise from the pit-racks and taking it down to another part of the floor and throwing it down there. They were making a big change in the floor at the time moving all merchandise from one end and putting it at the other end bringing some of it back and bringing it up towards the front.

Witness was shown a model which was subsequently introduced in evidence and about which he testified and marked [26] Plaintiff's Exhibit "A" and same will by stipulation be sent to the Appellate Court for illustration of the testimony.

(Testimony of R. A. Hammer.)

This pit-rack has another rack backed up against it on the back side. There would be an aisle in front and then on each side of that double pit-rack there would be an aisle and on the other side of the pit-rack, there would be an aisle. While they had been working about two nights that week I did not work, but during that time they moved a number of these pit-racks and I did not to my knowledge help move any of them. These pit-racks were about six feet high or a little over. I could not see on top of them, standing up to them. On top of the pit-racks there had been merchandise. For a cover on top there was a little lattice frame that was dropped in on top as is shown on the model which rested on 1x6 joists on each end of the pit-rack which was not nailed down but could be moved and shifted into other parts of the building or used on other pit-racks as they saw fit.

I had nothing to do with the construction or repair of these pit-racks but had been engaged in moving merchandise from the racks, to put the same in other parts of the building or in other pit-racks. My superior was Mr. Geddes and Mr. Bowlus, the latter having just started out as foreman of that floor. Mr. Geddes had been previous foreman. Mr. Geddes was out there more or less as Mr. Bowlus worked and directed the work; he was out there to see things were going as they should, until Mr. Bowlus should become thoroughly familiar with the work.

(Testimony of R. A. Hammer.)

On this particular morning there was some merchandise left in various places, one place in particular there were a number of vacuum cleaners and handles that they had ordered down and there were three of us working, I believe. [27] I was ordered to take goods down by Mr. Bowlus, I believe he gave the order, and he said to clear the racks, a general statement to clear all merchandise from the racks, as we had been doing.

I had worked about an hour and a half that morning moving merchandise and had worked at the other end of the building where we were putting the merchandise away and I helped remove vacuum cleaners from this particular part of the rack. There were perhaps twenty pit-racks or sections in one of these sets and it was nearly about the center where I was injured. The racks were about the center of the building. Vacuum cleaners had been piled on top of this lattice work on top of the pit-racks. In removing the merchandise I would hand it down or toss it down to other members of the crew below and they would place it on flat trucks and haul it away. At the time of the accident I had been removing merchandise from over near the end of the rack in the center of the building and we had completed moving that merchandise and I had gotten down on the flat truck partially loaded. Then I saw a handle that I had not gotten which was at the extreme end of the rack. It was not clear over where the others had been but was over nearer the center of the rack, so I climbed up on the flat car to

(Testimony of R. A. Hammer.)

get on the pit-rack and came across the rack, not on the rack on which I was injured but the one that was backed up against it. I went over and got this handle and put it down in the center aisle and was walking back across the pit-rack to get down on the same flat car when this particular portion of the rack gave away with me. On this particular rack that fell I had not seen any merchandise on it since it had been moved, but this place where I went up to get the handle was in the area I had been ordered to clear out, the pit-racks; it was the same racks. To get down from the pit-racks we had to get down the best way we could. There was not any ladder and usually we got down on a flat truck or [28] merchandise if it was the kind of merchandise we could step on.

"Q. From the place where you removed this handle to the place where the truck was standing, where you had to get down, was that in a direct line? Was this particular rack on which you fell, on a direct line between the two?

A. Yes. The north edge of this particular rack. The handle was on the same rack."

The handle was a broom handle or handle to a vacuum cleaner but I was not familiar with the merchandise. When I would get down I would get down on the flat truck which was in the aisle and this handle was up on a portion of the rack here (indicating). I came up on the flat truck, came around and just happened to miss this—I don't know how I did, to get the handle and threw it off

(Testimony of R. A. Hammer.)

and I was crossing back in the course that a person naturally would take as the most direct route to the place to get down and I stepped on this outside board (illustrating on model), causing me to fall to the floor. I was going to the flat truck which was probably two or three racks further than where I fell. The truck was partially loaded with heavy merchandise and made a sort of a staircase to descend on. I could not stand on top of the pit-rack in an upright position so that I could jump as there was no more than about five feet between the top of the rack and the ceiling and below there were sprinkler pipes for the ordinary sprinkler system, about one foot below the ceiling. In walking on the pit-racks I would have to walk with my head and shoulders quite a little forward or in a stooping position. The floor was concrete. I do not see any reason why these pit-racks could not be hooked in or fastened so they would remain solid.

I do not know of any board on the back of the pit-rack that had been removed. I did not see it and had nothing to do [29] with removing it nor had I been notified that it had been removed. The first I knew I stepped here on the rack and just went down. That was the first knowledge I had of any unsecurity or weakness in the pit-rack and I had not been notified by anybody to keep off any of those pit-racks, that they were being repaired, and had not been completed, and I saw no indication that they had not been completed.

(Testimony of R. A. Hammer.)

Testimony was given on the part of the plaintiff and other witnesses produced upon his behalf as to the nature and extent of his injuries which tended to support the allegations of the complaint as to said injuries.

Cross-examination by Mr. WILBUR.

I have had general experience in working on a farm and doing general work and doing everything a person is ordinarily called upon to do on a farm. I have done carpenter work and building fences. I worked with my father as a carpenter before my injury for three summers, doing all kinds of work as a carpenter, erection of buildings and barns and I was familiar with that kind of work and had been familiar with this kind of work when I went to work at Montgomery Ward's.

I started to work at Montgomery Ward's on Monday or Tuesday and the accident happened on Saturday of the same week and they were engaged in narrowing the aisles and moving up the pit-racks and I was working there at that place from Tuesday until the forenoon of Saturday of the same week. There were other men working around with me at that time. The entire force on the floor was engaged in working around there at different occupations. Before these racks could be moved they had to have the merchandise taken off, not only the merchandise piled on top but merchandise that was in the center and the merchandise that was in the bottom. We moved some of the racks with light

(Testimony of R. A. Hammer.)

merchandise still on top of them but the ordinary experience was [30] to move the merchandise.

These pit-racks were about fifty or sixty feet long. They were in sections about two or three feet wide and two or three feet deep, that is about twenty stalls to a section. When these were moved they moved the entire sixty feet at one time, or sixty or fifty or forty feet, whatever the length was. That was the impression that I received. I never helped move any of them and never saw any of them moved.

There were several men working around there. One was Mr. Geddes, Mr. Bowlus, Mr. Jackson, Mr. Jefferson, and several others.

These racks were all moved at one time. They were very light and could be moved very easily and I never assisted in taking down one of these racks nor dismantling them and never assisted in moving them and never assisted in putting them up nor did I ever assist in helping fasten them. These racks were nailed together but I do not know how they were constructed. They were all built in the carpenter shop.

In describing the racks the witness said:

There is an aisle down on one side of the section and the section backs up to another section of racks and I did not pay any attention as to how they were fastened or braced when completed. They had boards on them similar to those shown on the model but I do not believe they were nailed to the other racks, that is nailed to the rack that was backed up

(Testimony of R. A. Hammer.)

against this rack; the racks were in one long section forty to sixty feet long so that there would be no need of fastening them to anything. They were made to stand alone and to my knowledge they were built perfectly solid and supposed to be left in one piece and kept that way, this from my observation while employed there and working on this rack. There were cross braces across the back of [31] them occasionally. I noticed in the middle of these stalls there were pieces that ran crosswise, 1x6 material, which were nailed. Witness states that he made the model and further stated:

I noticed these cross-pieces across the front which were 1x6's and that these cross-pieces across the front would run clear across and this pit-rack from which I fell certainly did not have a piece in front because the way I fell you see, I stepped on the outside board and went down through and directly where the piece would have been and I would have struck it had it been there.

This section that I was working on was moved I believe Thursday night. I won't make a positive statement to that effect but I do not think it was moved on Saturday morning. I did not help move it and I had no knowledge that there was a broken board across the front or that men had gone from our gang to get a new board a short distance away.

As to the handle that I went to get from the top of the rack it was on a section about two sections over to the west or it was over two of these stalls and the handle was lying in between a 1x6, in a sort

(Testimony of R. A. Hammer.)

of a hollow. (Indicating on model.) It was sort of a handle. I do not know whether it was a handle of a broom or a vacuum cleaner. I went up to get it. I saw it up there and thought it ought to come down. I was looking for that kind of a thing, as we had been instructed previously to remove all merchandise from the racks and this was a portion of merchandise. We had instructions of this kind all along at various times to take down various parts and had received instructions that morning to remove the vacuum cleaners from the top of this same rack. Mr. Bowlus gave instructions on this section, to remove vacuum cleaners from that section. [32]

I am 5 ft. 11 in. tall. These pit-racks are six feet high or a little over, perhaps six feet three or four. It would not have been easy for me to reach up and get this handle because of the nature of the merchandise, it was too long to reach up and get. These handles come in cases or paste board cartons and are a few inches in diameter each way. The handle was in a carton. I do not know the exact measurements. This rack had been moved with light merchandise on top. When I got up on the rack I first got up on a flat truck and crawled up upon a rack about three sections to the east and the width between the boards on those things that set in on top was four to six inches.

I did not and could not jump onto that rack from across the aisle—the top of the rack is only five feet from the ceiling and perhaps ten inches below

(Testimony of R. A. Hammer.)
the ceiling are sprinkling pipes and this would make it impossible for anyone to jump in a crouch position a distance of some four or five feet across the aisle. [33]

TESTIMONY OF I. R. HAMMER, FOR PLAINTIFF.

I. R. HAMMER, father of plaintiff, testified that in his opinion the defendant could have secured the top of the pit-rack by fastening the same with hooks, nails or screws to the sides of the pit-rack or to the joints upon which said top rested, or by bracing the easterly and westerly walls of said pit-racks so that they would not bulge or spread apart, by placing a brace across the same, or by placing a wider joist at the top and along the inner sides of said pit-rack upon which said boards rested, and that so doing would not have lessened the efficiency or use of the structure or interfered with the operation of the defendant in carrying out its business. [34]

TESTIMONY OF JOE JEFFERSON, FOR DEFENDANT.

My name is Joseph Jefferson and I am employed by Montgomery Ward & Company and have worked for the company for about three years as floor manager.

I remember the time that Mr. Hammer fell and at that time I was assistant to the floor manager and

(Testimony of Joe Jefferson.)

at that time we were moving pit-racks and when the floor manager was gone it was up to me to see that the correct rack was taken and put in the correct place. The floor manager was Mr. Bowlus and he was present at the time of the accident and I remember the pit-rack from which the plaintiff fell. That pit-rack had been moved that morning shortly after eight o'clock. The particular section that was sitting there I would judge was seventeen or eighteen feet long. The pit-racks that were being moved at that time and place were taken apart in sections and would average between sixteen and twenty feet, not over twenty feet, and there were no sections moved over twenty feet long on that particular day. We had moved some larger three or four inches that were full length. That is the entire movement of them would be three or four inches. They would be moved either front or back. By being moved three or four inches I mean they were either moved to the front or to the back and the total movement would not be over three or four inches.

The particular section that was moved that morning was between sixteen and eighteen feet and there were four or five stalls in said section. This section came from about one hundred feet up the main aisle. [35]

The aisle was over five feet wide and in moving the sections the sections had to be moved around the corner. The moving of these sections was done by four or five of us working in the gang. There was

(Testimony of Joe Jefferson.)

a Mr. Gordy, a Mr. Jesse, Mr. Jackson, Mr. Hammer and myself. We had been working in the moving of these racks for about a week. Before we would move the section we had to have the racks cleared off so that when all of us got hold we would be ready to move it and when the racks were moved there was no merchandise on the rack. There was no merchandise on the particular rack moved that morning or if there was it was very small, laying on top, but I did not see any merchandise there nor was I aware of it and I was assisting in the moving. The plaintiff Hammer was engaged there at the time with the rest of us moving the rack. In moving the merchandise from the stalls before the racks were moved this was usually done by Mr. Hammer and Mr. Jackson and then all of us put the material back on the racks.

Speaking of the particular rack in question these racks were moved by detaching the sections so as to get it in a condition to be moved and they were nailed together at the center of the division, each section there, and when two sections were nailed together the boards met at the middle of a 2x4.

Witness takes the model and illustrates. (Exhibit "A.") [36]

Running across the length and the upper side there is a long stick which stands out beyond the stalls at each end and this sticks out or extends beyond the section and would be the thickness of one of these ends and the sections would come along and be put end to end. If the next section had a divider

(Testimony of Joe Jefferson.)

like the end it would come up to meet that board that sticks out, the one in front on top, this for the purpose of making a bin but if there was no divider the section would fit right up into the other so that the placing of the bin would depend upon the one that was being moved whether it fitted right up against it or not. The pieces that are across the front and top run longitudinally and were up on the front and also on the back at the top and at the bottom and some were placed diagonally across although they did not have one on the front at the bottom. In moving this particular section this longitudinal piece on top at the front had been broken loose with a hammer and had become split. The end of the board split and was in such a condition that it could not be used and when it was brought over to the place adjoining the other pit-racks we sent two of the boys for a new piece to replace it. We take off the old one and put on the new one and when this particular rack had been moved and put adjacent to the next rack it had not been fastened to the other rack. At the time the plaintiff got on this rack it was not fastened in any way. I had not seen anyone up there prior to the time that the plaintiff was up there. During the week prior to the time of the accident or substantially a week, Hammer, the plaintiff, had been engaged with the other men in helping move racks.

When these racks are moved they take the center shelves out in the aisles, the center shelves meaning those that fit in the racks. There were shelves on

(Testimony of Joe Jefferson.)

the top the same as at [37] the bottom and they would also take out the center shelving which would allow a man to walk upright inside the rack and he could take hold on each side and four or five of us could just take hold and walk with it. We distributed ourselves in and about the rack and picked it up and carried it over to the place. No fastenings had been made in any way at the time of the accident. The shelving was not taken off unless the rack was weak and they might fall and hit someone on the head and I did not think the shelving was taken off at that time but the shelves in the center had been taken out and at the time of the accident had not been put back.

The model was then referred to and in the condition that it was shown to the witness, the witness stated that the condition of the rack was as it was at the time of the accident except that it was not fastened to the adjoining rack but had the front piece which was split.

The witness testified: Mr. Hammer was working there with us at the time and Mr. Hammer at the time the work was going on had been on the rack that adjoined on the end the rack on which the accident happened. Mr. Hammer had been up on a rack adjoining and we had been piling vacuum cleaners on the adjoining racks but the rack on which the plaintiff fell had not been fastened to the adjoining rack. There was a space between the two racks the thickness of one of these bins or stalls which would be about two and one-half or three

(Testimony of Joe Jefferson.)

feet. The rack that they moved up there and the one on which Hammer got hurt was a kind that would leave a bin in between or stall like it is in the model. The rack on which the plaintiff fell or from which he fell was back I suppose about three feet. [38]

The witness was asked by the Court which rack it was that he fell from and made answer as follows:

"A. It was the last rack this way. The center one would not give, but the outside one this way, was the one that was next to the other rack, therefore a vacancy in between, and it had a chance to give.

Q. Well, now, just to clear that up again, I want to get it: Let us say that this over here was the rack represented by the blotting paper was the rack upon which he was working—I mean had been working before in putting up the vacuum cleaners. Then, as I understand, there was this space here between the rack on which he had been working and the rack that was brought up? A. Yes."

Witness then testified: He fell from the end rack and that was about two and one-half or three feet from the rack on which he was working. At the time this rack was brought up here it had pieces extending out at the upper side and the end was split and they had not been fastened up or lashed or nailed. In the section that was brought up there were four bins which would include the four as shown on the model and the one on the end would make the fifth. As to the covers they are made of

(Testimony of Joe Jefferson.)

boards across the top six feet long and one inch thick. These shelvings fit in very snugly against the rack to keep them from sliding either way and letting one corner drop down.

Witness was then shown a photograph, Defendant's Exhibit No. 1, representing the manner in which the racks are built. Witness then testified:

This picture is a very good one of the rack and represents the aisles where the accident happened. I can see the divisions where they were nailed and the upright pieces or 2x4's. When the racks are moved they are fastened by being [39] nailed at the end of each section, the ends meet half way over the 2x4 and they are nailed. That is, if you have a 2x4 the ends of the sections come right up to the middle of the 2x4 and are nailed solidly. There is a row of nails, one in each board. That would make two rows of nails, one row on the end of one board and another row on the end of the other board and both nailed into the 2x4. The picture referred to was marked as Defendant's Exhibit No. 1, and admitted.

(Here to be inserted a copy of defendant's picture No. 1.) [40]

DEFENDANT'S EXHIBIT No. 1.

(Testimony of Joe Jefferson.)

Witness was then asked to describe the picture to the jury, the mechanism, and was asked to show the rack from which the plaintiff fell and the witness testified as follows:

"A. Well, the rack he fell on was down here (referring to photograph); these are the two by four uprights, one in front and one behind.

JUROR.—The rack he fell from doesn't show there?

A. No, it does not. It is right here, right under where this pile of vacuum cleaners are piled.

Q. Now, as to these cross pieces right in here, do you see, that run from the front to the back, how are they nailed?

A. They are nailed very solidly, six or seven nails in each end.

* * * * * * * * * * *

Q. I will ask you to look at this shelf, as you call it, and ask whether or not that is a fair representation of the shelf as it was built to be fitted in? A. It is exactly as we used it.

JUROR.—What are these cross pieces here?

A. One by six.

JUROR.—And these pieces here?

A. One by four. These cross pieces this way are merely to keep these boards from sliding out. These are the ones that carry the weight.

Q. What is the distance between these shelves here? A. About six inches.

JUROR.—Do those boards one by six run lengthwise of the rack, or crosswise?

(Testimony of Joe Jefferson.)

A. Crosswise of the bin.

Q. The model shows lengthways?

A. Here is the one by six running crosswise to the stall, like this. [42]

Q. Well, that is running lengthways?

A. Well—

JUROR.—Are they wider through here, than this way? Which is the length, or width, of it? Is it narrower across that way, or this way?

A. It is narrower this way, than it is this way.

JUROR.—That is the length of the longest way?

A. That is what I thought of them, the length as being this way. It is longer through this way, than it is across this way.

Q. Let me show you another picture here, of this place, and ask you whether or not this shows the exact section which you were putting up at the time of the accident? (Defendant's Exhibit 2.)

A. It does. Right here is the section we were putting in.

Q. Is that the section itself? A. Yes.

Q. Where is that fastened there? Can you show them the two-by-four?

A. Here is the two by four it is fastened on to.

Q. That shows there shelves in place?

A. Yes, sir.

Q. I will ask you to state to the jury whether or not that is the way the shelves would be when they are finally set in and ready for business?

A. That is the way they are set in ready for stock. These tags up here show what is doing.

(Testimony of Joe Jefferson.)

JUROR.—Is that the condition the shelf was in at the time he fell?

A. No.

JUROR.—Did it have merchandise in it?

A. No, it did not have anything in here at all, and there was nothing on top.

JUROR.—That was after the merchandise was put in?

A. After we had finished the work.

JUROR.—How much bearing does each shelf have, or each end—how much bearing surface on its support on which the shelf rests?

A. An inch on each end. [43]

* * * * * * * * * * *

JUROR.—His testimony was that two men had gone to get one, and during the time that was in an improper condition. I would like to know the exact condition of that one by six.

COURT.—You may answer that question.

A. This when taken loose, it is not this long—it would be the thickness of one of these bins—it would stick out like this and come out approximately a half inch over this rack, and the bottom part of that, all of that, would be split down like that. That little piece on the bottom would be split off from this end, allowing a very little nailing surface there, so we had to put a new one on.

COURT.—Was that new one put on before this accident or after?

A. No, it was after the accident.

(Testimony of Joe Jefferson.)

Q. What was the man doing to get something to put on there in its place?

A. They had the measurements, the length of the board, and they had gone down to the end of the aisle to secure the new board."

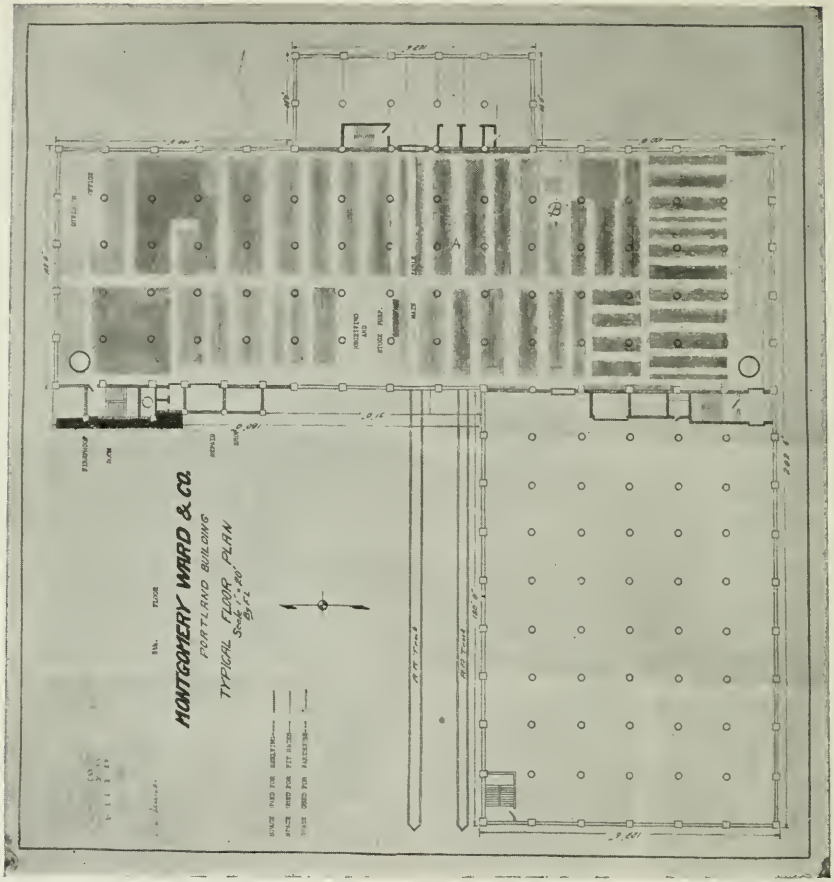
Witness further said that this piece had split when it had been taken loose from the other rack which would have been a tendency to weaken it. Mr. Hammer was not told to get up on this rack. The height of the pit-rack was six feet.

There was then introduced a photograph showing the situation marked Defendant's Exhibit No. 2.

(Here insert copy of photograph, Exhibit 2.) [44]

DEFENDANT'S EXHIBIT No. 2.

DEFENDANT'S EXHIBIT No. 3.



(Testimony of Joe Jefferson.)

There was then presented to the witness a map and witness stated that this map showed the general arrangement of the aisle at that time at the place where the accident happened. The map was marked as Defendant's Exhibit No. 3, and the witness testified:

When we began to change the pit-racks we began at the rear of the building where it is marked in the blue and we proceeded toward the red lines. Witness then marks on the aisle where the accident happened, said aisle being marked "a." This section which we have referred to was brought around to be put in place and we got it at the place marked "B." Said map is by stipulation to be forwarded to the Court of Appeals for examination by the Court.

Cross-examination by Mr. BERNARD.

I have been working for Montgomery Ward's three years. I am the floor manager of the fifth floor, and I was assistant at that time. Hammer came to work in this department either Monday or Tuesday, which was the first time he had worked on this floor and during that week we had moved approximately eighteen or twenty pit-racks. These pit-racks are each numbered and when this one would be in place it would be what we would call "D–3" but otherwise it has no distinguishing mark on it to distinguish it from any other pit-rack.

There is no record that Montgomery Ward has to show that this particular rack had been moved from any other place on the floor and the moving

(Testimony of Joe Jefferson.)

of the rack rests entirely upon my memory. The particular pit-rack that Hammer fell from is shown on Exhibit No. 1, being the second section, identified because it is nailed together at the end. I was present when the picture was taken. The pit-rack that he fell from constituted one of the number of pit-racks in which you call a section, which would be called [47] a complete aisle. The number of racks in a complete aisle varies according to the length of the rack, the stalls would be the same, and each aisle would have about twenty stalls. In moving in and out most of this merchandise, it was done mostly by Mr. Jackson, Mr. Hammer and myself. As to whether or not there had been any instructions given to go up on these pit-racks when he saw that something had been left there, the witness said that that would depend upon the size of it, whether the man should go up and get it or whether he should reach up. The men should get down anything that is left on the rack but not after the rack was moved. The bottom of the front piece upon this rack was completely broken off. At the time of this accident there were five of us there and I saw this broken piece. I was taking the rack loose and at that time Hammer was taking stock to a new bin. I could not say exactly where the new bin was but approximately two aisles away. At the time this front board was cracked I do not know where he was at that particular time but I told the men to get a new piece and it was moved to its new position before we got the new piece. I could not

(Testimony of Joe Jefferson.)

say exactly who helped to move the section but Mr. Hammer took hold of that pit-rack and helped move it. I know all of us men had hold of it and this section would weigh close to three hundred pounds. Hammer had hold of one of the sections. Mr. Hammer had been moving merchandise and putting it in a new bin. After the section had been moved Hammer saw a handle that had been left up on top but it was not on the rack we were moving but if there was a handle on the top it would be his duty to get it down. There was a truck alongside of the section upon which we piled merchandise which I would say was three or four stalls away. The aisle in front of the racks is a little over five feet.

After the rack had been moved it was set up near the place where it was going to be permanently but not clear up [48] against the other rack. It was three and one half feet away. I do not remember the exact distance but approximately.

When Mr. Hammer fell I was one aisle away taking down some merchandise out of a bin and the truck was three or four bins to the west. I was about even with Mr. Hammer when he fell. I saw Mr. Hammer fall and saw him fall on the pit-rack. I did not see him go up on it and I do not know how long he had been there. He was walking when I saw him. He did not have anything in his hands.

On the pit-racks immediately adjoining this particular section that we moved and put in there, there were vacuum cleaners, and when we had been mov-

(Testimony of Joe Jefferson.)

ing these vacuum cleaners Mr. Hammer had been piling them. All those vacuum cleaners and the handles were supposed to be moved out of the pit-racks where they then were. I saw Mr. Hammer fall, and saw him go down, and saw him on top of the pit-rack. I saw him walking and all of a sudden he went down.

Redirect Examination by Mr. WILBUR.

When we moved this rack section up we just carried it up there and saw the end of the board was clear of the rack. We walked with it right back in place and set it down but approximately put it in place. [49]

TESTIMONY OF NOBLE R. BOWLUS, FOR DEFENDANT.

This witness was duly called and testified:

I am a rebuyer for Montgomery Ward and have been with that company a little over two years. At the time of the accident to Mr. Hammer I was a floor man and I was foreman over Mr. Jefferson at the time of the accident. I did not see the accident but knew Mr. Hammer as an employee. I was out upon this work occasionally from time to time in a rather supervisory capacity and assisted the men in working on the floor, moving fixtures and merchandise.

The rack upon which Mr. Hammer was hurt was moved the morning of March 2d. I did not give

(Testimony of Noble R. Bowlus.)

Mr. Hammer any instructions about going up on this rack in any way. When the men go to work at eight o'clock I give general instructions and the work is outlined for them for half a day and the gang is supposed to carry out the instructions. I was not out on the floor at the time of the accident, at least I do not think I was but was off the floor about half an hour prior thereto. I issued no orders to Hammer to go up on the pit-rack.

Witness was shown Defendant's Exhibit No. 2, and he stated:

This showed the particular aisle where the plaintiff fell. I know the particular section. (Witness pointing out section.) As to the shelving that had been spoken of and shown in the model, on top, there is shelving on top and shelving of the same kind and character on the inside of the pit and just the same fixtures. The top shelf should be a perfect fit for the inside of the rack. These parts are interchangeable, the top shelving and the shelving on the inside, and they fit accurately. [50]

Cross-examination by Mr. BERNARD.

So far as the operation was concerned I was head of the fifth floor at the time of the accident, although there is a division supt. over me, and over the house in general there is a house operating superintendent. I am the boss in telling the boys what to do.

On the morning of the accident I was there on the job and issued instructions, not to Mr. Hammer personally but I laid out the work for that particular

(Testimony of Noble R. Bowlus.)

morning and Mr. Hammer was supposed to move merchandise. I did not have anyone standing over Mr. Hammer telling him every movement to make in the removal of the merchandise. As to Mr. Hammer, if he saw anything up on a rack whether or not it should be removed would all depend upon the position of the rack. If there was something in a rack that was supposed to be clear Mr. Hammer did not have to come to me to ask if he could take it down. I do not know anything about how the accident happened. The only orders I gave to Mr. Hammer on the day of the accident was to assist in moving the merchandise in general. [51]

TESTIMONY OF KELLY F. DOUGHERTY, FOR DEFENDANT.

This witness was called and gave the following testimony:

I am stock man at Montgomery Ward & Co. and have been working for the company a little over a year and was so working at the time of the accident to Hammer. At the time of the accident I had been working at this work for a week previous to the accident and was assisting in changing stock orders and relining up the stock. I was working with four or five fellows and Mr. Hammer was working in the bunch.

Relative to the movement of the pit-racks will say that in order to have the stock straight and everything, we had to move them around at that time a

(Testimony of Kelly F. Dougherty.)

good deal. I was there at the time of the accident about twenty or thirty feet away and I was sawing a board for the purpose I guess to brace the rack. I do not know exactly where the brace was to go but I know that it was going on the rack. No one told me to get this brace, only that it was needed on the rack. I do not know when this particular rack was moved. I do not recollect. Mr. Hammer was around there all the time with the rest of the bunch but I do not know about his assisting in moving the rack. I do not know if he assisted or not but I saw him working and moving stock and assisting in general. He had been doing this I believe for about a week. This particular section was between sixteen and twenty feet. I believe this section had been fastened to the adjoining rack though it had not been braced. I did not see the accident. [52]

TESTIMONY OF DAVE GEDDES, FOR DEFENDANT.

I was working for Montgomery Ward at the time of the accident as a rebuyer and I am still working for the company and I know where the accident happened on the fifth floor, but I did not see it but I was there shortly afterward, as soon as the news spread. It was not very long. When I got up to this section it had not been attached to the other rack. It was in position but it was not safe to be on. As to the method of attachment when the rack was to be put in place it had to be moved so as to join onto the rack at the end. The pieces protrud-

(Testimony of Dave Geddes.)

ing over the end were to be connected to an upright standard exactly the same as this. They met in the middle of a two by four on the other rack and were nailed, forming a brace, in a way, because this rack would be braced this way, where they fastened on. The rack that came in between was not braced, but the rack it fastened onto was again scissor-braced. In almost every case, if not every case, two racks were scissor-braced, leaving the one in between open, and then two more scissor-braced.

After the accident, as to the condition of the brace across the front as far as I can remember it was down, it was knocked off and splintered, but before the accident I had not seen it. I could not state where this section came from exactly but I was familiar with the floor because I had been in charge for two years and a half. This particular pit-rack was about sixteen feet long. When these sections were all joined and set in place as a permanent fixture they extended practically across one side of the building but not before they were set up and going together in place. When they were disjointed and being moved the sections were from fifteen to twenty feet long, sometimes longer a trifle, depending upon where you moved them. [53]

Cross-examination by Mr. BERNARD.

This rack in question had been moved with its back against another tier of racks, that is, the other rack was at the other end and it was moved right up against that one. It is not usual to nail the two

(Testimony of Dave Geddes.)

together. This particular section was not on the end of the row. This particular section was not at the other end of the row. It was to be set in between other racks. It did not form a part of the whole because it had not been fastened. It was sitting there but not in such a way that you could construe it as a part of that row or racks because it had not been set up against the other racks nor fastened. It was not set up on either end against another rack but it had been intended to set it up against the other racks supposedly and when set up, there would be no space between these racks and the adjoining racks. As to this space in there, those two timbers protruding fastened onto the upright, or the other one, joining them together, would leave a stall the same as those racks. There might have been a top on this particular section before the accident occurred but there was not afterwards. It was lying down on the concrete floor. [54]

TESTIMONY OF WILLIAM D. JESSIE, FOR DEFENDANT.

I am employed by Montgomery Ward and my occupation at that time was that of stockman. I was there on the morning of the accident and at the time of the accident I was in the office and did not see it. I had assisted in moving this particular section on which this accident happened. We got this section up in front and brought it toward the back and had to carry it thirty or forty feet.

(Testimony of William D. Jessie.)

I know Mr. Hammer personally and had been working with him five or six days and during this time we had all been moving the merchandise, moving the racks, setting the racks back. We took the merchandise off the racks and moved the racks back. Mr. Hammer was working in our gang. During the time I was working there, Mr. Hammer assisted in moving the racks. At the time of the accident this rack which had been moved had not been secured to the adjoining section. It had been moved up in place to be secured but was not secured. [55]

TESTIMONY OF R. A. HAMMER, FOR PLAINTIFF (RECALLED).

Plaintiff HAMMER was recalled as a witness for the plaintiff and testified:

I did not assist in moving this particular pit-rack upon which I was injured. There was no open space that I had to walk across and I did not know that the pit-rack had not been fastened to the adjoining rack. I did not have any knowledge on the question as to whether it was fastened or not. There was nothing that I observed as I walked along the top of the pit-rack which called my attention to the fact of any defect or insecurity in the pit-rack.

Witness excused.

The model used during the trial was introduced in evidence and marked Plaintiff's Exhibit "A."

All of the witnesses hereinabove referred to were

duly sworn and gave the testimony hereinabove set forth. [56]

I.

The defendant requested the Court to give the following instruction to the jury, which instruction the Court refused to give:

> "There is in the State of Oregon a law known as the Employer's Liability Law which is generally to the effect that all owners or persons engaged in the construction, repairing, alteration, removal or painting of any building, bridge, viaduct or other structure or in the erection or operation of machinery or in the transmission of electricity, shall use certain care and said law states that all owners or other persons having charge of or responsible for any work involving a risk or danger to the employees or the public shall use every device, care and precaution which it is practicable to use for the protection and safety of life and limb, limited only by the necessity for preserving the efficiency of the structure, machine or other apparatus or device and without regard to the additional cost of suitable material or safety appliances and devices."

II.

The defendant requested the Court to give the following instruction to the jury, which instruction the Court refused to give:

> "It becomes a question of fact in this case which you will have to determine from the evi-

dence which you have heard whether or not the kind of work that was being carried out at the time of the accident involved a risk or danger embraced within the Employer's Liability Act and before you will be authorized to apply the rules with regard to what would constitute negligence under the expressed provisions of the Employer's Liability Law."

III.

The defendant requested the Court to give the following instruction to the jury, which instruction the Court refused to give:

"I instruct you in the event that you do find from a preponderance of the evidence that the work in question did not involve a risk or danger under the provisions of said Employer's Liability Law, then in that event your deliberations and findings will be governed by the following rules of the common law which are as follows—" [57]

V.

The defendant requested the Court to give the following instruction to the jury which instruction the Court refused to give:

"I instruct you in this case that if the plaintiff was guilty of contributory negligence he may not recover and the rule is also that if you should find in this case that both parties were guilty of negligence, that is both the plaintiff and defendant, then the plaintiff may not recover."

VI.

The defendant requested the Court to give the following instruction to the jury which instruction the Court refused to give:

> "An employee assumes the ordinary risks and dangers of his employment in which he voluntarily engages to the extent those risks are known to him or in the exercise of reasonable care upon his part should have been known and where work is carried on and conducted in a way fully known to the employee and the employee continues to work in and about said place without objection he assumes the risks incident to the way and manner in which the business is conducted although a safer method could have been adopted." [58]

VII.

The defendant requested the Court to give the following instruction to the jury which instruction the Court refused to give:

> "If in this case you should find that this accident did come under the Employer's Liability Law as I have described it above, then the contributory negligence of the plaintiff as I have defined the same to you in these instructions is not an absolute bar to the right of recovery of the plaintiff but if you should find that the plaintiff is entitled to recover damages in this case and that the plaintiff himself was guilty of some negligence contributing to the injury then in assessing any damages that the plain-

tiff has sufferred as a result of this accident you should take into consideration the plaintiff's own negligence in fixing the amount of damages."

VIII.

The defendant requested the Court to give the following instruction to the jury which instruction the Court refused to give:

"It becomes a question of fact in this case, gentlemen of the jury, which you will have to determine from the evidence, whether or not it has been shown that the work engaged in by the defendant company was dangerous work, before you would be authorized to apply the rule with regard to what would constitute negligence under this express provision of the law to the case which you are trying. If you find that the same constitutes dangerous work, then the express provision of the law would be applicable, in so far as the evidence disclosed a compliance therewith or a failure to comply therewith upon the part of the defendant. And it also is a question of fact as to whether or not the work which is disclosed by the evidence to have been conducted by the defendant in this case involved a risk or danger to the employees, before you would be justified in applying to this case the rule with regard to what constitutes negligence in cases where there is an express provision of the law, and the express provision of the law to which I have called your attention, in determining

whether or not the defendant was negligent, and in case only that you find that the work involved risk or danger to the employees or the public would you be justified in applying this express provision of the law." [59]

At the conclusion of all the evidence in the case and the arguments of counsel, the Court instructed the jury as follows:

INSTRUCTIONS OF THE COURT TO THE JURY.

This is an action brought under the Oregon State Employer's Liability Act, which provides that all owners, contractors or sub-contractors, or other persons having charge of or responsible for any work involving risk or danger to the employee or the public, shall use every device, care and precaution which it is practicable to use for the protection and safety of life and limb, limited only by the necessity of preserving the efficiency of the structure or other apparatus or device, and without regard to the additional costs of suitable materials or special appliances or devices.

This duty imposed by law upon an employer is absolute, non-delegable and continuing.

In order for the plaintiff to recover in this action, he must prove by a preponderance of the evidence that the plaintiff was injured at a place where he had gone in the performance of his duties as an employee of the defendant, and that the plaintiff was at the place where the accident occurred

performing the duties he was required by the defendant to perform, and that the place where the plaintiff was performing his work at the time of the accident involved risk and danger; and in determining these questions you are to take into consideration the place in which the work was being done, the condition under which the work was being performed, and the class of work which the plaintiff was performing, and all of the attendant and surrounding circumstances.

If you find by a preponderance of the evidence that at the time of the accident described in the complaint the plaintiff was in the performance of his duties as an employee of the defendant, as I have heretofore mentioned, and that the place where plaintiff fell (that is the top of the pit-rack) was a place involving risk and danger considering the work the plaintiff was required, if any, to perform, then it would be incumbent upon the defendant to use every care, device and precaution which it was practicable to use for the protection and safety of the life and limb of the plaintiff, limited only by the necessity of preserving the efficiency of the work which the plaintiff was performing at the time, and without regard to the additional cost of suitable safety appliances, devices or precautions.

Plaintiff alleges that the defendant could have made the place where the plaintiff was performing his work securely safe by fastening the false floor or lattice work with hooks, nails or screws to the sides of said pit-rack, or to the joist upon which the top rested, or by bracing the easterly and

westerly walls of said pit-racks so that they could not bulge or spread apart, by placing a brace across the same, or by placing a wider joist at the top and along the inner side of the pit-rack upon which the boards rested; and that either of these methods would have [60] increased the efficiency of the structure without interfering with the operations of the defendant to carry on its business; and it is essential that plaintiff prove this allegation by a preponderance of the evidence.

If you find that it was not practicable to use the above devices or precautions at the time of the accident without interfering with the efficiency of the work which the plaintiff was performing, you should find for the defendant. If, on the other hand, you find by a preponderance of the evidence that the defendant failed to use the devices and precautions set forth in the complaint, and that such devices and precautions were practicable and would not interfere with defendant's work, or with the work which defendant was carrying on, and if you also find by a preponderance of the evidence in favor of the plaintiff on the other allegations in the complaint, your verdict should be for the plaintiff.

The burden of proof is upon the plaintiff to establish to your satisfaction, by a preponderance of the evidence, that the defendant was negligent in the matters set forth in the complaint.

By a preponderance of the evidence is meant the greater weight of the evidence, or the evidence which is the more convincing. To illustrate this—if upon the entire consideration and comparison of

all the evidence received in the case, both as to how the accident happened and as to the injury, if any, which the plaintiff sustained therefrom, you find the same to be equally balanced between the plaintiff and defendant, or in such a state that you are unable to say upon which side it weighs the heavier, then, the plaintiff has failed to sustain the burden of proof, and your verdict should be for the defendant.

You are instructed that you must disregard any feelings of sympathy that you may have in this case for the injured person and base your verdict entirely upon the evidence introduced herein and the instructions of the Court.

It is not proper for you to speculate as to the cause of the accident, nor as to who is the negligent party, but the plaintiff having alleged that the defendant was negligent in a certain way, it is necessary for the plaintiff to prove this, and unless the plaintiff does prove this there can be no recovery.

Negligence is defined by the law to be the doing of something which a person of ordinary and reasonable care and prudence would not have done under the particular circumstances, or it may consist in failing to do that which a person of ordinary care and prudence would have done under the same circumstances.

In this case the defendant has pleaded contributory negligence. Contributory negligence consists of such acts or omissions on the part of the person injured as would amount to the want of ordinary care upon his part, and if the plaintiff in this case

was guilty of negligence causing or contributing to his injury then he should be held by you to have been guilty of contributory negligence. [61]

The amount of care and precaution which the plaintiff must use to prevent injury to himself depends upon the dangers of his employment, and if said plaintiff was working in or about a place which was dangerous it would be necessary for the plaintiff to use greater care and precaution than would be necessary where the employment was simple and not of great hazard.

Contributory negligence does not constitute a defense to this action, but if established it must be taken into consideration by you in fixing the amount of the damages, if any. If you find by a preponderance of the evidence that the plaintiff was guilty of contributory negligence which was one of the proximate causes of the accident, then if you find for the plaintiff on the issues raised by the complaint, you will determine in what degree the respective negligence of the plaintiff and defendant contributed to the accident; and in so doing, if you find that the negligence, if any, of the plaintiff contributed to or caused the accident to the extent of one-third of the entire negligence then plaintiff's damage should be decreased by one-third; if to the extent of one-half, then his damages should be reduced one-half. In other words, you should apportion the damages to the respective negligence, if any, of the plaintiff and defendant.

Under the Employer's Liability Act, it is no defense to show that the plaintiff assumed the risks incident to his employment.

You are the exclusive judges of the effect and value of the evidence. You have heard the witnesses, you have observed their demeanor while upon the witness-stand, and it is for you alone to determine where the truth lies. You are not to be governed by the number of witnesses that testify to a given point or subject; you are to be governed by the conviction the evidence brings to your minds.

A witness is presumed to speak the truth, but this presumption may be overcome by the manner in which the witness testifies, by the character of his testimony, or by contradictory evidence.

If you believe that any witness has intentionally testified falsely concerning any material matter in this case, you may disregard the evidence of such witness, except in so far as it may have been corroborated by other testimony.

One witness worthy of belief is sufficient to prove any fact in this case.

If after a careful consideration and comparison of the evidence in this case, you come to the conclusion that the plaintiff should recover, then it is your duty to determine the amount that he is entitled to recover under the evidence and the instructions which I have heretofore given you. And if you find that the plaintiff is entitled to recover, in assessing his damages it is your duty to allow him such sum of money as will fairly and reasonably compensate him for the injuries you may find from

the evidence he has sustained by reason of this accident, taking into consideration the [62] physical suffering, if any, that he has sustained or will in the future by reason of the accident, and such sum as will reasonably, fairly and justly compensate him for the time he has lost, or for the time that he will lose in the future, if any, by reason of such accident; and if you find from the evidence that he has been permanently injures, you will take into consideration pain and suffering that he will in the future be compelled to endure, if any, by reason of his injuries, and the time, if any, that he will be compelled to lose in the future by reason of such accident; and you have a right to take into consideration whether or not his strength and vitality have been impaired or diminished, whether or not his health has been undermined, weakened or impaired, and whether or not plaintiff's nerves in his back, spine or hips were weakened, injured and impaired, and whether or not such injuries are permanent, and if permanent, you should allow him such sum as in your judgment will fairly and fully and reasonably compensate him for the injuries received, as you find sustained by the evidence in this case, not to exceed the sum of $30,000.00; and in arriving at the amount, if any, to be allowed to the plaintiff, you should not be governed by sympathy, bias or prejudice either for or against the plaintiff or defendant. If you find at the same time that the plaintiff was guilty of contributory negligence, you should make the deduc-

tions according to the instructions I have heretofore given you.

Now, Gentlemen, in this court a unanimous verdict is required. When you retire, you will elect one of your number as foreman, who will alone sign the verdict?

Mr. WILBUR.—Yes, your Honor.

Mr. BERNARD.—Yes, your Honor.

COURT.—I will state, Gentlemen of the Jury, the court will be in session until four o'clock this afternoon. If you arrive at a verdict before that time, you may have the bailiff inform the Court, and the verdict will be received. If, however, you fail to find a verdict by that time, you will continue your deliberations until you reach a verdict. You will then have the verdict signed by the foreman, placed in an envelope and sealed, and left in charge of the foreman. You will report it into court tomorrow morning at 10 o'clock, at which time the presence of all of you will be required.

Are there any exceptions, Gentlemen?

(Thereupon the following proceedings were had and the following exceptions were taken.)

Mr. WILBUR.—No exceptions, your Honor, to the instructions of the Court except the matters we have discussed here as to the instructions in the alternative—instruction on the common law and the Employer's Liability Law.

COURT.—I understand that you mean that I should instruct the jury as to the common-law obligation of the defendant?

Mr. WILBUR.—In the alternative.

COURT.—Well, I am asking that question. [63]

Mr. WILBUR.—Yes, your Honor.

COURT.—I want it explicit.

Mr. WILBUR.—Definite statement under the State Liability Law, and therefore the failure to give instructions under contributory negligence, assumed risk, and as set forth in the requested instructions.

COURT.—Have you any exceptions?

Mr. BERNARD.—No, I think not, your Honor.

The statement of the defendant's counsel that he had no exceptions 'except the matters we have discussed here as to the instructions in the alternative,' refers to a discussion which was had as to whether the Court should instruct on the common-law liability of the defendant as well as its liability under the employer's liability law.'' [64]

After the jury had been charged, it retired and later returned a verdict against the defendant for the sum of $12,500, with interest at the rate of 6% per annum from September 25, 1929, and for costs and disbursements which were later assessed at the sum of $83.07, and judgment was entered on said day for said sums.

That within the time allowed by this Court the foregoing bill of exceptions was served and filed with the Clerk thereof.

This defendant prays that this bill of exceptions may be allowed, settled and signed by the Court.

WILBUR, BECKETT, HOWELL & OPPENHEIMER,

Attorneys for Defendant and Plaintiff in Error.

IT IS HEREBY ORDERED that the foregoing bill of exceptions heretofore served, filed and lodged with this Court be and the same is hereby settled and allowed as the bill of exceptions for use in the United States Circuit Court of Appeals for the 9th Circuit at San Francisco pursuant to the petition for appeal filed herein.

THIS IS TO CERTIFY that the said bill of exceptions contains in substance all of the evidence and of the proceedings in the trial of the above-entitled action necessary to the determination of the appeal.

IT IS FURTHER ORDERED that there be transmitted to the Clerk of the Circuit Court of Appeals aforesaid all of the exhibits in the above-entitled cause as per stipulation of the attorneys herein duly authenticated by the Clerk of [65] this Court for the inspection of said Appellate Court and that said exhibits may be used upon said appeal with like effect as though said exhibits had been copied and set forth in this bill of exceptions.

Dated this 3d day of December, 1929.

JOHN H. McNARY,

Judge of the District Court of the United States for the District of Oregon.

Filed December 4, 1929. [66]

AND AFTERWARDS, to wit, on the 23d day of October, 1929, there was duly filed in said court a petition for appeal, with order allowing appeal, in words and figures as follows, to wit: [67]

PETITION FOR ORDER ALLOWING APPEAL.

Now comes the defendant in the above-entitled action, to wit, Montgomery Ward & Company, a corporation, and plaintiff in error, and petitions that an appeal be allowed to said plaintiff in error and for the allowance of an appeal in the above-entitled action from a judgment in the District Court of the United States for the District of Oregon, to the Circuit Court of Appeals of the United States for the Ninth Circuit, which judgment was made and entered in said District Court on the 25th day of September, 1929, for the sum of $12,500.00 with interest at six per cent per annum from said date and for costs and disbursements amounting to and taxed at $83.07, and this plaintiff in error desires to appeal from said judgment and the whole thereof and states that a certified transcript of the record will be filed in the office of the Clerk of the United States Court of Appeals for the Ninth Circuit within thirty days from the time of filing this notice or within such time as may be extended by the Court.

This petitioner also prays that a petition may issue and a transcript of record be sent to the said Appellate Court and prays that this Court fix the amount of supersedeas bond to be given by said plaintiff in error. [68]

This petitioner prays that said appeal be allowed by the above-entitled court and that said plaintiff

in error be allowed to prosecute its appeal in the United States Circuit Court of Appeals for the Ninth Circuit under and according to the laws of the United States and for that purpose that a transcript of the record and proceedings and all papers upon which the judgment and rulings herein were rendered, duly authenticated as by law provided, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit and upon the giving of a supersedeas bond as may be required by this Court, that all proceedings in this court be suspended and stayed until the determination of this appeal, and your petitioner will ever pray.

WILBUR, BECKETT, HOWELL & OPPENHEIMER,

By R. W. WILBUR,

Attorneys for Petitioner. [69]

ORDER.

The attorneys for the defendant herein having presented to this Court its petition for an appeal from this court to the Circuit Court of Appeals for the Ninth Circuit, said Court hereby allows said appeal and fixes the amount of the bond to be given for costs and supersedeas in the sum of Fifteen Thousand Dollars ($15,000.00) and said appeal is hereby allowed.

Dated October 23, 1929.

R. S. BEAN,

Judge.

Filed October 23, 1929. [70]

AND AFTERWARDS, to wit, on the 23d day of October, 1929, there was duly filed in said court an assignment of errors, in words and figures as follows, to wit: [71]

ASSIGNMENTS OF ERROR.

Now comes Montgomery Ward & Company, a corporation, plaintiff in error, and files with its notice of appeal the following assignments of error upon which it will rely in its prosecution of said appeal in the above-entitled action.

I.

That the Court erred in its rulings in this case and in the instructions of the Court that the cause of action mentioned in the complaint was as a matter of law under the Employers' Liability Law of the State of Oregon and not under the common-law rules of liability in force in the State of Oregon at the time of the accident mentioned in the complaint.

An exception was taken to instructions on this point as given by the Court.

II.

That the Court erred in instructing the jury in this action that the said action was brought under the Employers' Liability Law of the State of Oregon and was not brought upon the common-law theory as the law existed in the State of Oregon at the time of the said accident.

An exception was taken to instructions on this point as given by the Court. [72]

III.

That the Court erred in instructing the jury that this action mentioned in the complaint was brought under the Employers' Liability Law of the State of Oregon as it existed at the time of the accident mentioned in the complaint, instead of leaving to the jury the decision as to whether or not the accident mentioned in the complaint involved a risk or danger as is defined in the Workmen's Compensation Law of the State of Oregon, it being the theory of the defendant that under the law the Court should have submitted the question to the jury as to whether or not the action was under the Employers' Liability Law of the State of Oregon and one involving a risk or danger, or an action under the common-law theory, or in other words, that the instructions should have been given to the jury in the alternative.

An exception was taken to the instruction of the Court that said action was under the Employers' Liability Law and that as a matter of law the defendant was bound by the provisions of said act.

IV.

That the Court erred in failing to give an instruction to the jury as requested by the plaintiff in error, which is as follows, to wit:

> "There is in the State of Oregon a law known as the Employers' Liability Law, which is generally to the effect that all owners or persons engaged in the construction, repairing, alteration, removal or painting of any building,

bridge, viaduct or other structure or in the erection or operation of machinery or in the transmission of electricity, shall use certain care and said law states that all owners or other persons having charge of or responsible for any work involving a risk or danger to the employees or the public shall use every device, care and precaution which it is practicable to use for the protection and safety of life and limb, limited only by the necessity for preserving the efficiency of the structure, machine or other apparatus or device and without regard to the additional cost of suitable material or safety appliances and devices." [73]

An exception was taken to the failure of the Court to give said instruction.

V.

That the Court erred in failing to give an instruction to the jury as requested by the plaintiff in error, which is as follows, to wit:

"It becomes a question of fact in this case which you will have to determine from the evidence which you have heard whether or not the kind of work that was being carried out at the time of the accident involved a risk or danger embraced within the Employers' Liability Act and before you will be authorized to apply the rules with regard to what would constitute negligence under the expressed provision of the Employers' Liability Law."

An exception was taken to the failure of the Court to give said instruction.

VI.

That the Court erred in failing to give an instruction to the jury as requested by the plaintiff in error, which is as follows, to wit:

> "I instruct you in the event that you do find from a preponderance of the evidence that the work in question did not involve a risk or danger under the provisions of said Employers' Liability Law, then in that event your deliberations and findings will be governed by the following rules of the common law which are as follows:"

An exception was taken to the failure of the Court to give said instruction.

VII.

The following are the instructions requested under the common law: (Being numbered VII, VIII, IX, X, XI.)

That the court erred in failing to give an instruction to the jury as requested by the plaintiff in error which is as follows, to wit: [74]

> "In this case also the defendant has pleaded contributory negligence. Contributory negligence consists of such acts of omissions on the part of the person injured as would amount to the want of ordinary care on his part and if the plaintiff in this case was guilty of negligence causing or contributing to his injury, then

he should be held by you to have been guilty of contributory negligence."

An exception was taken to the failure of the Court to give said instruction.

VIII.

That the Court erred in failing to give an instruction to the jury as requested by the plaintiff in error, which is as follows, to wit:

> "I instruct you in this case if the plaintiff was guilty of contributory negligence he may not recover and the rule is also that if you should find in this case that both parties were guilty of negligence, that is both the plaintiff and defendant, then the plaintiff may not recover."

An exception was taken to the failure of the Court to give said instruction.

IX.

That the Court erred in failing to give an instruction to the jury as requested by the plaintiff in error, which is as follows, to wit:

> "An employee assumes the ordinary risks and dangers of his employment in which he voluntarily engages to the extent those risks are known to him or in the exercise of reasonable care upon his part should have been known and where work is carried on and conducted in a way fully known to the employee and the employee continues to work in and about said place without objection he assumes the risks

incident to the way and manner in which the business is conducted although a safer method could have been adopted."

An exception was taken to the failure of the Court to give said instruction. [75]

X.

That the Court erred in failing to give an instruction to the jury as requested by the plaintiff in error, which is as follows, to wit:

"If in this case you should find that this accident did come under the Employers' Liability Law as I have described it above, then the contributory negligence of the plaintiff as I have defined the same to you in these instructions is not an absolute bar to the right of recovery of the plaintiff but if you should find that the plaintiff is entitled to recover damages in this case and that the plaintiff himself was guilty of some negligence contributing to the injury then in assessing any damages that the plaintiff has suffered as a result of this accident you should take into consideration the plaintiff's own negligence in fixing the amount of damages."

An exception was taken to the failure of the Court to give said instruction.

XI.

That the Court erred in failing to give an instruction to the jury as requested by the plaintiff in error, which is as follows, to wit:

"It becomes a question of fact in this case, Gentlemen of the Jury, which you will have to determine from the evidence, whether or not it has been shown that the work engaged in by the defendant company was dangerous work, before you would be authorized to apply the rule with regard to what would constitute negligence under this express provision of the law to the case which you are trying. If you find that the same constitutes dangerous work, then the express provision of the law would be applicable, in so far as the evidence disclosed a compliance therewith or a failure to comply therewith upon the part of the defendant. And it also is a question of fact as to whether or not the work which is disclosed by the evidence to have been conducted by the defendant in this case involved a risk or danger to the employees, before you would be justified in applying to this case the rule with regard to what constitutes negligence in cases where there is an express provision of the law, and the express provision of the law to which I have called your attention, in determining whether or not the defendant was negligent, and in case only that you find that the work involved risk or danger to the employees or the public, would you be justified in applying this express provision of the law."

An exception was taken to the failure of the Court to give said instruction. [76]

XII.

The Court erred in giving the following instruction to the jury:

> "This is an action brought under the Oregon State Employers' Liability Act, which provided that all owners, contractors or sub-contractors, or other persons having charge of or responsible for any work involving risk or danger to the employee or the public, shall use every device, care and precaution which it is practicable to use for the protection and safety of life and limb, limited only by the necessity of preserving the efficiency of the structure or other apparatus or device, and without regard to the additional cost of suitable materials or special appliances, or devices."

Plaintiff in error took an exception to said instruction.

XIII.

The Court erred in giving the following instruction to the jury:

> "Contributory negligence does not constitute a defense to this action, but if established it must be taken into consideration by you in fixing the amount of the damages, if any. If you find by a preponderance of the evidence that the plaintiff was guilty of contributory negligence which was one of the proximate causes of the accident, then if you find for the plaintiff on the issues raised by the complaint, you will determine in what degree the respective

negligence of the plaintiff and defendant contributed to the accident; and in so doing, if you find that the negligence, if any, of the plaintiff contributed to or caused the accident to the extent of one-third of the entire negligence then plaintiff's damages should be decreased by one-third; if to the extent of one-half, then his damages should be reduced one-half. In other words, you should apportion the damages to the respective negligence, if any, of the plaintiff and defendant."

Plaintiff in error took an exception to said instruction.

The exceptions heretofore mentioned in the assignments of error were allowed by the Court. [77]

IX.

That the Court erred in entering judgment in favor of plaintiff and against defendant for the sum of $12,500.00, with interest at the rate of six per cent per annum from the 25 day of September, 1929, and for the further sum of $83.07 *Dollars,* costs and disbursements.

WHEREFORE this plaintiff in error prays that this case be reversed on account of the errors hereinabove mentioned.

WILBUR, BECKETT, HOWELL & OPPENHEIMER,

Attorneys for Defendant and Plaintiff in Error.

Filed October 23, 1929. [78]

AND AFTERWARDS, to wit, on the 23d day of October, 1929, there was duly filed in said court a bond on appeal, in words and figures as follows, to wit: [79]

APPEAL BOND AND SUPERSEDEAS.

KNOW ALL MEN BY THESE PRESENTS, that we, Montgomery Ward & Company, a corporation, as principal, and American Surety Company of New York, a corporation, as surety, are held and firmly bound unto the above-named R. A. Hammer, a minor, by his guardian *ad litem,* I. R. Hammer, in the sum of Fifteen Thousand Dollars, to be paid to said plaintiff, for payment of which well and truly to be made we bind ourselves and each of us, our and each of our successors and assigns, jointly and severally by these present.

Sealed with our seals and dated this 23d day of October, 1929.

WHEREAS lately at a regular term of the District Court of the United States for the District of Oregon in a suit pending in said court between R. A. Hammer, a minor, by his guardian *ad litem,* I. R. Hammer, as plaintiff, and Montgomery Ward & Company, a corporation, as defendant, a judgment was rendered against said defendant, Montgomery Ward & Company, a corporation, in the sum of $12,500.00 with interest at the rate of six per cent per annum from the 25th day of September, 1929, and for all costs and disbursements in said action, taxed and amounting to the sum of

$83.07 *Dollars,* which judgment was [80] entered in the above-entitled court on the 25th day of September, 1929, and said defendant having filed a petition of appeal in the Clerk's office of said court to reverse the said judgment of said court in the aforesaid action and said petition of appeal having been allowed and a citation issued directed to said plaintiff, R. A. Hammer, a minor, by his guardian *ad litem,* I. R. Hammer, the same being defendant in error, citing it to be and appear before the United States Circuit Court of Appeals for the Ninth Circuit to be held in San Francisco, State of California, according to law, within thirty days of date thereof,—

Now, the condition of this obligation is such that if the said Montgomery Ward & Company, a corporation, defendant shall prosecute its appeal to effect and answer all damages and costs if it fails to make good its plea, then the above obligation to be void; otherwise to remain in full force and virtue.

IN WITNESS WHEREOF the said principal, Montgomery Ward & Company, a corporation, and the said surety, American Surety Company of New York, a corporation, have caused their corporate names and seals to be hereunto signed and affixed this 23 day of October, 1929.

MONTGOMERY WARD & CO., INC.
By B. HUDDLESTON,
Manager.

WILBUR, BECKETT, HOWELL & OPPENHEIMER.

By R. W. WILBUR,
Its Attorneys.

AMERICAN SURETY COMPANY OF NEW YORK.

By W. A. KING,
Resident Vice-President.

[Seal of the American Surety Company.]

Attest: N. CODY,
Resident Assistant Secy. [81]

The foregoing bond is hereby approved by me this 23 day of Oct., 1929.

R. S. BEAN,
District Judge of the Above-entitled Court.

Filed October 23, 1929. [82]

AND AFTERWARDS, to wit, on the 23d day of October, 1929, there was duly filed in said court a stipulation to send original exhibits to the Court of Appeals, in words and figures as follows, to wit: [83]

STIPULATION RE TRANSMISSION OF ORIGINAL EXHIBITS.

IT IS STIPULATED between the parties hereto and their respective attorneys that all of the original exhibits in this action may be transmitted by the Clerk of this court to the Clerk of the United States Circuit Court of Appeals for the Ninth Cir-

cuit at San Francisco, California, to be used and considered in connection with the appeal in this case and that the same be authenticated by the Clerk.

COLLIER, COLLIER & BERNARD,
Attorneys for Plaintiff.

WILBUR, BECKETT, HOWELL & OPPENHEIMER,
By R. W. WILBUR,
Attorneys for Defendant.

Filed October 23, 1929. [84]

AND AFTERWARDS, to wit, on Wednesday, the 23d day of October, 1929, the same being the 89th judicial day of the regular July term of said court—Present, the Honorable ROBERT S. BEAN, United States District Judge, presiding—the following proceedings were had in said cause, to wit: [85]

MINUTES OF COURT—OCTOBER 23, 1929—ORDER TRANSMITTING ORIGINAL EXHIBITS.

Pursuant to a stipulation between the parties hereto,—

IT IS HEREBY ORDERED that the Clerk of this court forward to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, all of the original exhibits introduced at the trial of this cause and as filed and received in this court, duly authenticated by the Clerk.

Dated Oct. 23, 1929.

R. S. BEAN,
Judge.

Filed October 23, 1929. [86]

AND AFTERWARDS, to wit, on the 4th day of December, 1929, there was duly filed in said court, a praecipe for transcript, in words and figures as follows, to wit: [87]

In the District Court of the United States for the District of Oregon.

R. A. HAMMER, a Minor, by His Guardian ad Litem, I. R. HAMMER,

Plaintiff,

vs.

MONTGOMERY WARD & COMPANY, a Corporation,

Defendant.

PRAECIPE FOR TRANSCRIPT OF RECORD.

To the Clerk of the Above-entitled Court:

Please include in the record for the Circuit Court of Appeals for the Ninth Circuit for the proceedings in error and appeal in the above-entitled cause, the following:

1. Complaint.
2. Answer of defendant.
3. Reply.
4. Verdict.

5. Judgment order.
6. Stipulation to forward original exhibits to Circuit Court of Appeals.
7. Order to forward original exhibits to Appellate Court.
8. Bill of exceptions with acknowledgment of service endorsed thereon.
9. Petition for appeal.
10. Order allowing petition for appeal.
11. Appeal and supersedeas bond.
12. Citation with acknowledgment of service.
13. Assignments of error.
14. Order extending time for docketing case in Circuit Court of Appeals for Ninth Circuit.
15. This praecipe.
16. Clerk's certificate.

WILBUR, BECKETT, HOWELL & OPPENHEIMER,

By R. W. WILBUR,

Attorneys for Plaintiff in Error. [88]

IT IS STIPULATED AND AGREED by and between the parties to the above-entitled action through their respective attorneys that this praecipe contains all parts of the record in anywise material to the consideration of this action by the Circuit Court of Appeals and for the purpose of reviewing the same.

IT IS FURTHER STIPULATED that in the printing of the said transcript the title of the case,

court and cause, verification and acceptance of service may be omitted except as to the complaint.

WILBUR, BECKETT, HOWELL & OPPENHEIMER,
Attorneys for Plaintiff in Error.

COLLIER, COLLIER & BERNARD,
Attorneys for Defendant in Error.

Filed December 4, 1929. [89]

[Title of Court and Cause.]

CITATION.

United States of America, Ninth Judicial Circuit, and to R. A. Hammer, a Minor, by His Guardian *ad Litem,* I. R. Hammer, and to Your Attorneys, Collier, Bernard & Collier, GREETING:

You are cited and admonished to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit in San Francisco, California, within thirty days from the date hereof pursuant to a petition of appeal filed in the office of the Clerk of the United States District Court for the District of Oregon wherein R. A. Hammer, a minor, by his Guardian *ad Litem,* I. R. Hammer, is defendant in error, and Montgomery Ward & Company, a corporation, is plaintiff in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in said petition of appeal mentioned should not be corrected and why

speedy justice should not be done to the parties in that behalf. Said petition for appeal has been allowed and security has been given as is required by law.

WITNESS the Honorable R. S. BEAN, Judge of the United States District Court for the District of Oregon, this 23 day of Oct., 1929.

R. S. BEAN,
United States District Judge.

[Seal] Attest: G. H. MARSH,
Clerk. [90]

[Endorsed]: Filed Oct. 23, 1929. [91]

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO TRANSCRIPT OF RECORD.

United States of America,
District of Oregon,—ss.

I, G. H. Marsh, Clerk of the District Court of the United States for the District of Oregon, do hereby certify that the foregoing pages, numbered from 3 to 89, inclusive, constitute the transcript of record upon the appeal in a cause in said court, in which R. A. Hammer, a minor, by his guardian *ad litem,* I. R. Hammer, is plaintiff and appellee, and Montgomery Ward & Company is defendant and appellant; that the said transcript has been prepared by me in accordance with the praecipe for transcript filed by said appellant and is a full, true and complete transcript of the record and proceedings had in said court in said cause, in accordance with the

said praecipe, as the same appear of record and on file at my office and in my custody.

I further certify that the cost of the foregoing transcript is $14.10 and that the same has been paid by the said appellant.

IN TESTIMONY WHEREOF I have hereunto set my hand and affixed the seal of said court, at Portland, in said District, this 7th day of December, 1929.

[Seal] G. H. MARSH,
Clerk. [92]

[Endorsed]: No. 6007. United States Circuit Court of Appeals for the Ninth Circuit. Montgomery Ward & Company, a Corporation, Appellant, vs. R. A. Hammer, a Minor, by His Guardian *ad Litem,* I. R. Hammer, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the District of Oregon.

Filed December 9, 1929.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.